CL Docket #96-98
[redacted]

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Request by ALTS for Clarification	)	
of the Commission's Rules Regarding	)	CCB/CPD 97-30
Reciprocal Compensation for	)	
Information Service Provider Traffic	)	
	)	

COMMENTS OF FOCAL COMMUNICATIONS, INC.

Focal Communications Corporation ("Focal"), through undersigned counsel, submits its Comments in support of the Association for Local Telecommunications Services' ("ALTS") request for expedited clarification of the Federal Communications Commission's ("FCC") Rules regarding reciprocal compensation for the termination of Information Service Provider ("ISP") traffic.

I. INTRODUCTION AND BACKGROUND

Focal is a competitive local exchange carrier ("CLEC"). Focal or its subsidiaries are certificated to provide local exchange service in Illinois and New York, and have an application pending in New Jersey. Where authorized, Focal will provide local exchange and interexchange telecommunications services to business and residential customers by combining its own facilities with the unbundled network elements and wholesale services of incumbent local exchange carriers ("LECs"). Focal is currently providing local exchange service in Illinois over its own facilities.

Focal strongly supports ALTS' request for expedited clarification that:

(1) calls to an Information Service Provider ("ISP") made from within a local calling area must be treated as local calls by any and all local exchange carriers involved in carrying those calls; and

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(2) calls to an ISP made from within a local calling area are not to be handled differently than other local traffic is handled under current reciprocal compensation arrangements.

As ALTS explains, at least two large incumbent LECs, Bell Atlantic and NYNEX, are refusing to pay CLECs for local traffic terminated to a CLEC's ISP customer.[1] At least four other incumbent LECs, Ameritech, Southwestern Bell, Pacific Bell, and Southern New England Telephone, have threatened to take similar action. Focal has signed one interconnection agreement with Ameritech and is currently in the process of negotiating an interconnection agreement with NYNEX. To date, Ameritech has not threatened to withhold compensation for Focal's termination

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[1]US West has also argued, in the context of its interconnection arbitrations before state commissions, that enhanced service provider traffic, including ISP traffic, is exempt from the reciprocal compensation obligations of Section 251. However, US West's position has been consistently rebuffed by the state commissions that have considered the issue. *See, Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996,* Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 et al. (Arizona Corp. Comm. Oct. 29, 1996) at 7; *Petition of MFS Communications Company, Inc., for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with US WEST Communications, Inc.,* Decision Regarding Petition for Arbitration, Docket No. 96A-287T (Col. PUC Nov. 5, 1996) at 30; *Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc., Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996,* Order Resolving Arbitration Issues, Docket Nos. P-442, 421/M-96-855, P-5321, 421/M-96-909, P-3167, 421/M-96-729 (Minn. PUC Dec. 2, 1996) at 75-76; *Petition of MFS Communications Company, Inc., for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996,* Commission Decision, Order No. 96-324 (Ore. PUC Dec. 9, 1996) at 13; *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US WEST Communications, Inc., Pursuant to 47 USC § 252,* Arbitrator's Report and Decision, Docket No. UT-960323 (Wash. Utils. and Transp. Comm. Nov. 8, 1996) at 26.

of local traffic to its ISP customers. However, based on other carriers' experiences, Focal is aware of the high probability that this issue will arise in the very near future.

The incumbent LECs have already shown their willingness to delay the introduction of competition to the local exchange markets by engaging in protracted litigation and appeals of state commission arbitration decisions and the FCC's trilogy of Orders[2] designed to open the local exchange markets to competition. Without swift action by the FCC, incumbent LECs will likely pursue the same route with regard to this issue, withholding compensation due under reciprocal compensation arrangements and forcing the interconnecting CLECs to resort to litigation to claim compensation due.

As a small new entrant in the local exchange market, Focal is still in the process of negotiating interconnection agreements, obtaining financing, building its network, and building a customer base. Focal is currently in the process of developing multiple products and lines of business. Providing local exchange service to ISPs is currently one of Focal's business products. Because Focal has only recently entered the market and because its early business operations rely in part on providing service to ISPs, unlike the large incumbent LECs, Focal does not have the luxury of turning to other business operations while the issue of reciprocal compensation for ISP

[2]*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("Local Competition Order"), Order on Reconsideration, 11 FCC Rcd 13042 (1996), *petition for review pending and partial stay granted, sub nom. Iowa Utils. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, FCC 97-157 (rel. May 8, 1997) ("Universal Service Order"); *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, FCC 97-159 (rel. May 16, 1997) ("Access Reform Order").

traffic is litigated *ad infinitum* before the state public utilities commissions and the courts. Quick resolution of this issue by the FCC is thus imperative.

II. A Subscriber's Call to an ISP Located in the Same Calling Area is Telecommunications Eligible for Reciprocal Compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications is established in Section 251(b)(5) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and applies to all telecommunications carriers. In interpreting this provision of the Act, the FCC exempted interexchange telecommunications from reciprocal compensation in order to preserve the interstate access charge regime.[3] Incumbent LECs allege that because ISP traffic is overwhelmingly interexchange traffic (by virtue of the ISPs connection to the Internet), the exemption for interexchange traffic created in the Local Competition Order applies to local calls placed to ISPs.

This contention is not supported by the Act or the FCC's trilogy of Orders. First, the reciprocal compensation exemption was based on the legal distinction between charges for transport and termination of local traffic and charges for access service for long distance telecommunications:

> The Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic.[4]

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[3]Local Competition Order at ¶¶1033-1034

[4]Local Competition Order at ¶1033.

In order to preserve this distinction, the FCC found that Section 251(b)(5) reciprocal compensation obligations apply only to traffic that originates and terminates within a local area, as defined by the state public utilities commissions. Thus, the issue that the FCC must clarify is that calls placed by a subscriber to an ISP located within the same local calling area originate and terminate within that local calling area.

Three recent findings by the FCC support ALTS' position that calls to ISPs are local telecommunications subject to the reciprocal compensation obligations of Section 251(b)(5) of the Act. First, the FCC recently affirmed ISPs'[5] exemption from interstate access charges. In reaffirming the ISP exemption, the FCC noted that "it is not clear that ISPs use the public switched network in a manner analogous to IXCs" and "many of the characteristics of ISP traffic ... may be shared by other classes of business customers."[7] This decision clearly indicates that the FCC continues to refuse to treat ISP traffic as interexchange. This decision also clearly indicates that the rationale underlying the interexchange exemption from reciprocal compensation (interexchange traffic is subject to access charges) does not apply to ISP traffic.

Second, the FCC recently found that the components of Internet access -- the connection to the ISP via voice grade access to the public switched network and the information service

[5]Enhanced services include access to the Internet. Access Reform Notice of Proposed Rulemaking at ¶284. Thus ISPs are eligible for the ESP exemption from paying interstate access charges.

[6]Access Reform Order at ¶¶344-345.

[7]Access Reform Order at ¶345.

subsequently provided by the ISP -- are severable and do not constitute a single service.[8] Third, the FCC unambiguously characterized the first severable component, the connection between the end user and the ISP, as local traffic in its Access Reform Order.[9] To the extent the information service, or the telecommunications component with which it may be bundled, may be classified as interexchange, the initial call placed over the public switched network which terminates at the ISP's telephone number is separate and severable from that interexchange component.

All common carriers have a duty to provide services to end users within their service areas upon request. ISPs are enhanced service providers that are end user customers, not common carriers, under the FCC's rules.[10] As end users, ISPs may request local exchange service from any local exchange service provider. ISPs typically purchase business lines from the incumbent LEC out of the incumbent LEC's intrastate tariff, paying interstate end user common line charges but not access charges.[11] Because the ISP is an end user, and not a carrier, the call placed over the public switched network to the ISP is a local call. When an incumbent LEC's customer places a call to an ISP served by the incumbent LEC within the local calling area, the customer placing the call is charged within

[8]Universal Service Order at ¶¶83, 788-789.

[9]Access Reform Order at ¶342, n. 502 ("To maximize the number of subscribers that can reach them through a *local call*, most ISPs have deployed points of presence") (emphasis added).

[10]*See*, Second Computer Inquiry, 77 FCC.2d 384, ¶¶119-132 (1980). *See also*, Access Reform Order at ¶343 (no reason to extend the interstate access system to ISPs, an "additional class of ***customers***") (emphasis added).

[11]Access Reform Order at ¶342.

the local rate structure. If it is a local call when the incumbent LEC serves both customers, then it is a local call when the incumbent LEC serves one customer and the CLEC serves the other. When the ISP accepts the call, answer supervision is returned and a local call has been established. The call has terminated at the ISP's local number. So long as the call terminates on the incumbent LEC's or CLEC's network in the same local calling area in which the call originated, it is telecommunications subject to the reciprocal compensation provisions of the Act.

III. Policy Considerations Support ALTS' Request for Expedited Clarification

Important policy considerations also support expedited clarification that calls to ISPs are telecommunications eligible for reciprocal compensation. First, if calls to ISPs do not terminate on the serving LEC's network but rather, as the incumbent LECs allege, are part of an end-to-end service that is overwhelmingly interexchange, the distinctions between telecommunications services and information services and between telecommunications service provider and information service provider break down. Such a breakdown has important, adverse consequences for the universal service program. The FCC recently preserved the definitional scheme by which certain services (enhanced and information services) are exempted from regulation under Title II of the Act.[12] It rejected the assertion that because they are offered via "telecommunications," information services are inherently telecommunications services.

[12]Universal Service Order at ¶787.

> When a subscriber obtains a connection to an Internet service provider via voice grade access to the public switched network, ***that connection is a telecommunications service and is distinguishable from the Internet service provider's service offering***. The language in section 254(h)(2) also indicates that information services are not inherently telecommunications services.[13]

This distinction is the basis of the FCC's decision not to require ISPs to contribute to universal service support (to the extent they provide information services) and the basis of the FCC's decision that the telecommunications component of access to an ISP, provided by an eligible telecommunications carrier, is a telecommunications service eligible for universal service support for health care providers.[14] The FCC must therefore reaffirm both the severability and the classification of a subscriber's connection to an ISP via voice grade access to the public switched network and find that such calls are telecommunications that are eligible for reciprocal compensation when the subscriber and the ISP are located within the same local calling area.

Second, if calls to ISPs were not eligible for reciprocal compensation, a LEC's costs for transporting and terminating traffic to ISPs would go uncompensated. The LEC would not be able to collect reciprocal compensation to recover the costs of transporting and terminating the traffic, nor would the LEC be able to collect access charges for such costs. The only compensation the LEC would be able to collect would be from the charges imposed on ISPs. ISPs may purchase local business exchange service from incumbent LECs' intrastate tariffs and incumbent LECs may recover

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[13]Universal Service Order at ¶789 (emphasis added).

[14]Universal Service Order at ¶630 (any telecommunications service within the prescribed bandwidth limitations used to obtain access to an ISP is eligible for support).

any additional costs they incur from their ratepayers. CLECs, on the other hand, do not have a base of ratepayers to cover the costs of network upgrades to serve ISPs. Exempting ISP traffic from reciprocal compensation would therefore effectively preclude CLECs from being able to provide service to ISPs.

Finally, the FCC has established a docket to investigate the unique costs associated with ISP traffic and the unique nature of ISP traffic. As it stated in the Universal Service Order:

> The classification of information services, and especially Internet-based services, raises many complicated and overlapping issues... We have issued a Notice of Inquiry seeking comment on the treatment of Internet access and other information services that use the public switched network. We intend in that proceeding to review the status of ISPs under the 1996 Act in a comprehensive manner.[15]

Incumbent LECs should not be allowed to prejudice the outcome of that docket by creating what is in effect a new classification for ISP traffic, not local and not interexchange but "overwhelmingly interexchange," subject to neither reciprocal compensation nor access charges. As the FCC has already determined, its Docket investigating usage of the public switched network by information service providers and ISPs[16] is the proper place to resolve such issues.

IV. CONCLUSION

The FCC created the exemption from reciprocal compensation for interexchange traffic to preserve the legal distinction between access charges and charges for the transport and termination

[15]Universal Service Order at ¶790.

[16]*In the Matter of Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket No. 96-263, Notice of Inquiry, FCC 96-488 (rel. Dec. 24, 1996).

of local telecommunications traffic. Because a subscriber's call to an ISP within the same local calling area terminates on the serving LEC's network and does not implicate the FCC's access charge regime, the exemption does not apply to such calls. The FCC should therefore clarify, on an expedited basis, that calls originating on one LECs network and terminating on another LEC's network in the same local calling area are eligible for reciprocal compensation under Section 251(b)(5) regardless of whether the called party is an ISP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wendy Mills, hereby certify that on the 17th day of July, 1997, copies of the foregoing Comments of Focal Communications, Inc. were served via courier on the following:

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